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No. 73-334

In the Supreme Court of the United States

OCTOBER TERM, 1973

SEYMOUR MATANKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on thirty-nine counts of making false statements in a matter within the jurisdiction of a department or agency of the United States, in violation of 18 U.S.C. 1001. He was sentenced to concurrent terms of imprisoment for three years on each count; imposition of the sentence was suspended and petitioner was placed on probation for one year, in addition to which he was fined $1,500 on each count, or a total of $58,500. The court of appeals affirmed, finding that many of the issues raised on appeal were "frivolous" (Pet. App. A 1-8), and a petition for rehearing was denied (Pet. App. B).

Petitioner, a medical doctor practicing in the Los Angeles area, submitted 39 Requests for Medicare Payment to three insurance companies which were under contract, pursuant to 42 U.S.C. 1395u, with the Social Security Administration, Department of Health,

Education, and Welfare, to process such claims and to pay them from federal funds. Testimony by petitioner's patients and nursing personnel showed that the services claimed were not in fact rendered (Pet. App. A 2, 4-5).

The petition purports to present 34 questions, which, due to duplication and overlap, boil down to about 20 distinct questions. None of these questions raises any issue warranting this Court's review. We rely in the main upon the opinion of the court of appeals,[1] and we deal here only with a few issues not expressly disposed of in that opinion.

1. Petitioner contends that the general "false statement" statute, 18 U.S.C. 1001, was rendered inapplicable to his Medicare claims by reason of the fact that the statute establishing the Medicare program in 1965 incorporated by reference, *inter alia,* the provisions of the 1935 Social Security legislation making it a misdemeanor, punishable by a fine of not more than $1,000 or imprisonment for one year or both, to make or cause to be made a false representation of a material fact in an application for payment under the program. 42 U.S.C. 408(b); cf. 42 U.S.C. 408(c). Enactment of the later special statute, however, did not limit the applicability of 18 U.S.C. 1001. *United*

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[1] The court of appeals expressly disposed of petitioner's contentions here concerning the number of counts; the sufficiency of the evidence; the claimed vagueness of 18 U.S.C. 1001 and its application to claims submitted by doctors to insurance companies acting as agents for the government; the trial court's instructions as to wilfulness; the competency of certain government witnesses and disclosure by the prosecutor of information relevant thereto; the prosecutor's references to the amounts involved in the claims and to petitioner's appearance; and the adequacy of petitioner's trial counsel.

States v. *Chakmakis*, 449 F. 2d 315, 316 (C.A. 5); see *United States* v. *Gilliland*, 312 U.S. 86, 93-95.

2. Petitioner's related claim that the trial court erred in failing to charge the jury as to violation of 42 U.S.C. 408(b) as a lesser included offense is also without merit. Petitioner's reliance upon *Keeble* v. *United States*, 412 U.S. 205, is misplaced, for there the Court, in a context not here pertinent, merely referred to the general rule that "the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Id.* at 208; see Rule 31(c), Fed. R. Crim. P. Here, however, although 42 U.S.C. 408(b) does not expressly require that the false representation be made "knowingly and wilfully," as is required by 18 U.S.C. 1001, petitioner does not contend that a lesser degree of specific intent or awareness is required by the former than the latter, and it has been held in analogous circumstances that a statute like 42 U.S.C. 408(b) is not violated by acts occurring through accident, misunderstanding, inadvertence, or other innocent reasons. *United States* v. *Irwin*, 354 F. 2d 192, 197 (C.A. 2) (construing 18 U.S.C. 201(f)). As the court of appeals noted, there was sufficient evidence to support the jury's verdict that petitioner knowingly and wilfully submitted false statements, and even if the jury had believed petitioner's claim that he was personally blameless for any false statements, it could not have convicted him for violation of 42 U.S.C. 408(b) while accquitting him on the charge of violating 18 U.S.C. 1001.

3. Petitioner's claim that he was denied his Sixth Amendment right to a speedy trial is insubstantial.

Petitioner claims that the government was aware of the underlying facts—relating to claims from 1968 to 1970—as early as 1970, that he was not indicted until April 1972, that his trial did not begin until October 1972, and that at some unspecified time three of the thirteen patients in question died.[2] The indictment, however, was returned well within the statutory period, and there is no suggestion that any pre-indictment delay was intentionally caused by the government to harass petitioner or gain some tactical advantage over him. See *United States* v. *Marion*, 404 U.S. 307, 325-326. As to the six-month period between indictment and trial, petitioner's claims do not even remotely indicate a denial of his right to a speedy trial. Compare *Barker* v. *Wingo*, 407 U.S. 514.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[2] These patients accounted for four of the thirty-nine counts submitted to the jury based on services allegedly rendered in January and October 1970.